UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 10
1200 Sixth Avenue, Suite 900
Seattle, WA 98101-3140

OFFICE OF
REGIONAL COUNSEL

April 20, 2012

Confidential Settlement Communication – Subject to Fed. R. Evid. 408

Joseph A. Brogan
Foster Pepper PLLC
1111 Third Avenue, Suite 3400
Seattle, WA 98101-3299

Re: Port of Tacoma's wetland delineation, categorization, and conceptual mitigation plan for the Clear Creek Site. *U.S. v. Port of Tacoma, et al.*, No. 11-cv-05253 (W.D. Wa.).

Dear Mr. Brogan:

This letter addresses the Port of Tacoma's proposal to rely on the Upper Clear Creek Mitigation Site for mitigation in the above referenced matter. The letter outlines the United States' evaluation of the wetland delineation for the Upper Clear Creek Mitigation Site, and provides our response to the Port of Tacoma's conceptual plan. We appreciate the Port's continuing cooperation in this matter and look forward to advancing our discussion of compensatory mitigation.

I. Wetland Delineation and Categorization

As we discussed at our settlement conference on January 25, 2012, and our site visit on April 9, 2012, reaching an agreement on the wetland delineation and categorization for the Upper Clear Creek Mitigation Site ("UCCMS") is essential to reaching an overall agreement on the scope of compensatory mitigation. In addition, agreement on the wetland delineation and categorization will serve our collective interests as we negotiate a penalty in this case.

In general, the United States agrees with the Port's wetland delineation at the UCCMS. However, we disagree that the wetlands within the UCCMS are Category II wetlands. Rather, our review of the Port's written analysis as well as our peer review observations on April 9, 2012, demonstrates that the wetlands at the UCCMS are Category I wetlands.

A. *Wetland Delineation*

An accurate geographic representation of the wetlands and waters at the UCCMS allows the parties greater confidence in discussing the scope, objectives, and footing for compensatory mitigation. The accuracy of the delineation is particularly relevant here given the size and complexity of the site; but also because of the Port's interest in using some portions of the site for other purposes, such as advance mitigation credit.

Our technical team, which includes Dr. Lyndon Lee, Dr. Scott Stewart, and Ms. Rebecca Chu, reviewed Grette Associates' delineation of wetland boundaries at the UCCMS. Following our peer review on April 9th, we agree that the delineation is accurate.

However, our technical team did note two issues that we ask Grette to address. First, we ask that Grette confirm that portions of the Clear Creek channel run within the Port's property boundaries as a Type 3 water of the United States. In addition, we request a revision to the wetland delineation report that includes mapping and area calculations for Clear Creek as a cartographically distinct unit.

Second, our technical team inspected two culverts located through the linear mound of side-cast material that parallels the right bank (looking downstream) of Clear Creek. These culverts provide direct hydrologic connections –flooding and draining – between Clear Creek and the wetlands to the east. We request that Grette revise the wetland delineation report and maps to show the locations and types of culverts on the UCCMS, as well as vectors depicting flood and drainage flows through those culverts.

B. *Wetland Categorization*

An accurate characterization of the existing condition and functioning of the wetlands and waters at the UCCMS, based on the Washington State Wetlands Rating System, is central to the United States' evaluation of the Port's conceptual mitigation proposal. Wetland rankings assist in our analysis of ecosystem functioning, and in the development of appropriate project targets and standards for mitigation activities.

Grette characterizes the wetlands within the UCCMS as Category II wetlands. In reaching that conclusion, Grette's overall score for the Clear Creek wetlands was 67 points, with individual wetland functions scored as follows:

- water quality functions – 16;
- hydrologic functions – 32; and
- habitat functions – 19.

We disagree with Grette's analysis.

Our peer review of Grette's report and visit to the UCCMS suggest that the overall score for the wetlands should be 76 points, and that the wetlands should be characterized as Category I wetlands. Specifically, our technical team concluded that the following revisions are warranted:

- (R 1.1) area of surface depressions covers > ½ area of wetland, which is scored as a **4**;
- (H 1.2) hydroperiods – saturated only, which is scored as a **3**;
- (H 1.3) richness of plant species is >19 plant species, which is scored as a **2**;
- (H 1.4) interspersion of habitats is high, which is scored as a **3**; and
- (H 1.5) special habitat features – add undercut banks and denning banks for beaver, which is scored as a **4**.

These revisions change the scoring for individual wetland functions as follows:

- water quality functions – 20 (from 16);
- hydrologic functions – 32 (unchanged); and
- habitat functions – 24 (from 19).

We ask that Grette review our conclusions and make the appropriate revisions to the wetland categorization or provide us with additional information to substantiate its original scoring.

II. Conceptual Mitigation Plan

Throughout our interactions, the Port has understood and agreed that any settlement of this enforcement action would include completing a compensatory mitigation project for impacts to the Hylebos Marsh and Wetland EB-1B. The Port has presented several options related to the UCCMS.

As we understand, the Port first attempted to resolve this matter directly with the U.S. Army Corps of Engineers in July 2009. At that time, the Port offered 10.19 acres of mitigation at the UCCMS (2.16 acres of creation, 8.03 acres of rehabilitation) and 9.49 acres at Parcel 14. After EPA's involvement in the matter, the Port offered in October 2010 to mitigate 14.31 acres (3.02 acres of creation, 9.36 acres of rehabilitation) at the UCCMS for the impacts to Hylebos Marsh alone. Finally, the Port's April 9, 2012, conceptual plan offers 7.56 acres (1.44 acres of creation, 6.12 acres of rehabilitation) at the UCCMS to mitigate for impacts at both Hylebos Marsh and Wetland EB-1B.

The United States supports targeting the UCCMS as a viable mitigation project. The various mitigation options presented so far have the necessary elements of an acceptable mitigation plan. Notwithstanding the distinctions among the various offers, we provide the following response to the April 9 conceptual plan and propose two modifications that would address our remaining concerns.

As a preliminary matter, compensatory mitigation means "the restoration (re-establishment or rehabilitation), establishment (creation), enhancement, and/or in certain circumstances preservation of aquatic resources for the purposes of offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved." 33 C.F.R. § 332.2 (*see* Attachment 1, Section II). Depending on the type of mitigation activity taken (*e.g.*, enhancement versus establishment), the appropriate mitigation ratio to account for aquatic impacts will change. *See* 40 C.F.R. Part 230, Subpart J; *and* 33 C.F.R. Part 332 (2008 Compensatory Mitigation for Losses of Aquatic Resources); 2006 Wetland Mitigation in Washington State (Washington State Department of Ecology, U.S. Army Corps of Engineers Seattle District, EPA R10). Likewise, for long-term temporary impacts that last for more than two years, the U.S. Army Corps of Engineers considers those impacts to be permanent in nature, even if the area is eventually restored. Consequently, the compensatory mitigation ratio for long-term impacts assumes permanent wetland loss (*see* Attachment 2).

The April 9 conceptual plan proposes to restore scrub-shrub wetlands (3.27 acres), restore forested wetlands (4.29 acres), restore riparian forests (4.02 acres), rehabilitate wetlands (6.12 acres), and created/restore wetlands (1.44 acres). The United States has two principal concerns with the April 9 conceptual plan.

First, in contrast to the graphic presented in the December 2011 Conceptual Mitigation Plan (*see* Figure 3, p. 31 of the December 2011 Plan), the April 9 conceptual plan does not include any work to develop hydrologic connections or channels between the Clear Creek channel system and the mitigation wetlands – *i.e.*, the Port's conceptual plan is to work within and to improve conditions of the depressional wetlands adjacent to Clear Creek. We understand the April 9 conceptual plan to be an effort at restoration of the natural/historic functions at the site and establishment (*i.e.*, creation) of aquatic functions in some upland areas of the site. The restoration efforts at the UCCMS should target the site's potential (*see* Attachment 1, Section I) – *i.e.*, the overall goal at UCCMS should be to restore the structure and functioning of a riverine wetland ecosystem. The April 9 conceptual plan limits the overall ecological improvements to restoring depressional wetlands on valley alluvium adjacent to Clear Creek. As a consequence, the Port's proposal does not achieve the site's potential.

Second, the April 9 conceptual plan assumes that the impacts at Hylebos Marsh and Wetland EB-1B are temporary, and not permanent impacts. Given the time it will take either Hylebos Marsh or Wetland EB-1B to restore themselves – either passively or through active restoration efforts – the United States considers the impacts to be permanent. In addition, if the goal of the April 9 conceptual plan is to restore depressional wetlands adjacent to Clear Creek, then the United State will consider the majority of mitigation efforts to be enhancement, and not restoration or establishment. As a result, there is insufficient acreage in the April 9 conceptual plan to mitigate the permanent impacts at Hylebos Marsh and Wetland EB-1B.

Despite these two concerns, the United States believes the two modification to the April 9 conceptual plan could provide sufficient mitigation to account for the impacts at Hylebos Marsh and Wetland EB-1B. The United States would agree to the broad objectives and scope of the mitigation plan, if the Port agrees to the following modifications:

A. Remove the two culverts discussed in Section I.A above, and create an opening/channel connection in the existing side-cast fill that parallels the river right (looking downstream) bank of Clear Creek. The opening/channel connection should be designed and managed to allow Clear Creek to regularly and frequently interact with the adjacent (mitigation site) wetlands.

B. Grade the linear side-cast fill mound that parallels the Clear Creek channel in the northwest corner of the UCCMS. The grading should be designed and executed to allow for regular and frequent overbank flooding from the Clear Creek channel to the wetlands and for surface (and/or shallow subsurface) drainage from the wetland to Clear Creek.

These modifications would not result in a significant increase in acreage considered under the April 9 conceptual plan. In addition, the modifications would result in restoration and/or establishment of a Category I riverine wetland ecosystem at the UCCMS. Finally, we expect that the modified plan would be more appealing to the Washington State Department of Ecology, the U.S. Army Corps of Engineers, and to the federal agencies responsible for administering the Endangered Species Act.

Overall, the United States is encouraged with the level of cooperation and effort the Port put into developing a mitigation proposal to address the Clean Water Act violations at Hylebos Marsh and Wetland EB-1B. We look forward to working with the Port to settle this matter in a timely manner.

Sincerely,

Ankur K. Tohan
Assistant Regional Counsel

Attachment

CC: Michael Szerlog, EPA
Mary Anne Thiesing, EPA
Rebecca Chu, EPA
Austin Saylor, DOJ
Kent Hanson, DOJ

Attachment 1 - Definitions

I. Site Potential (WAFAM; Brinson et. al. 1993; Smith et. al. 1995): The highest level of functioning possible, given local constraints of disturbance history, land use, or other factors. Site potential may be equal to or less than levels of functioning established by Reference Standards.

II. Definitions of Compensatory Mitigation (40 CFR § 230.92):

Approaches for offsetting unavoidable adverse impacts which remain after all appropriate and practicable avoidance and minimization has been achieved.

A. Restoration (re-establishment or rehabilitation): *Restoration* means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former or degraded aquatic resource. For the purpose of tracking net gains in aquatic resource area, restoration is divided into two categories: *reestablishment* and *rehabilitation*.

1. ***Re-establishment*** means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of returning natural/historic functions to a former aquatic resource. Re-establishment results in rebuilding a former aquatic resource and results in a gain in aquatic resource area and functions.

2. ***Rehabilitation*** means the manipulation of the physical, chemical, or biological characteristics of a site with the goal of repairing natural/historic functions to a degraded aquatic resource. Rehabilitation results in a gain in aquatic resource function, but does not result in a gain in aquatic resource area.

B Establishment (creation): *Establishment* (creation) means the manipulation of the physical, chemical, or biological characteristics present to develop an aquatic resource that did not previously exist at an upland site. Establishment results in a gain in aquatic resource area and functions.

C. Enhancement: *Enhancement* means the manipulation of the physical, chemical, or biological characteristics of an aquatic resource to heighten, intensify, or improve a specific aquatic resource function(s). Enhancement results in the gain of selected aquatic resource function(s), but may also lead to a decline in other aquatic resource function(s). Enhancement does not result in a gain in aquatic resource area.

D. Preservation: *Preservation* means the removal of a threat to, or preventing the decline of, aquatic resources by an action in or near those aquatic resources. This term includes activities commonly associated with the protection and maintenance of aquatic resources through the implementation of appropriate legal and physical mechanisms. Preservation does not result in a gain of aquatic resource area or functions.

Attachment 2 – Washington State Mitigation Ratios (permanent loss)

2006 Wetland Mitigation in Washington State (Washington State Department of Ecology, U.S. Army Corps of Engineers Seattle District, EPA R10)

Table 1a. Mitigation ratios for western Washington.

Category and Type of Wetland Impacts	Re-establishment or Creation	Rehabilitation Only[21]	Re-establishment or Creation (R/C) and Rehabilitation (RH)[21]	Re-establishment or Creation (R/C) and Enhancement (E)[21]	Enhancement Only[21]
All Category IV	1.5:1	3:1	1:1 R/C and 1:1RH	1:1 R/C and 2:1 E	6:1
All Category III	2:1	4:1	1:1 R/C and 2:1 RH	1:1 R/C and 4:1 E	8:1
Category II Estuarine	Case-by-case	4:1 Rehabilitation of an estuarine wetland	Case-by-case	Case-by-case	Case-by-case
Category II Interdunal	2:1 Compensation must be interdunal wetland	4:1 Compensation must be interdunal wetland	1:1 R/C and 2:1 RH Compensation must be interdunal wetland	Not considered an option[22]	Not considered an option[22]
All other Category II	3:1	6:1	1:1 R/C and 4:1 RH	1:1 R/C and 8:1 E	12:1
Category I Forested	6:1	12:1	1:1 R/C and 10:1 RH	1:1 R/C and 20:1 E	24:1
Category I - based on score for functions	4:1	8:1	1:1 R/C and 6:1 RH	1:1 R/C and 12:1 E	16:1
Category I Natural Heritage site	Not considered possible[23]	6:1 Rehabilitation of a Natural Heritage site	R/C Not considered possible[23]	R/C Not considered possible[23]	Case-by-case
Category I Coastal Lagoon	Not considered possible[23]	6:1 Rehabilitation of a coastal lagoon	R/C not considered possible[23]	R/C not considered possible[23]	Case-by-case
Category I Bog	Not considered possible[23]	6:1 Rehabilitation of a bog	R/C Not considered possible[23]	R/C Not considered possible[23]	Case-by-case
Category I Estuarine	Case-by-case	6:1 Rehabilitation of an estuarine wetland	Case-by-case	Case-by-case	Case-by-case
NOTE: Typical ratios for preservation are discussed in Section 6.5.5.					

21 These ratios are based on the assumption that the rehabilitation or enhancement actions implemented represent the average degree of improvement possible for the site. Proposals to implement more effective rehabilitation or enhancement actions may result in a lower ratio, while less effective actions may result in a higher ratio. The distinction between rehabilitation and enhancement is not clear-cut. Instead, rehabilitation and enhancement actions span a continuum. Proposals that fall within the gray area between rehabilitation and enhancement will result in a ratio that lies between the ratios for rehabilitation and the ratios for enhancement (see Appendix H for further discussion).

22 Due to the dynamic nature of interdunal systems, enhancement is not considered an ecologically appropriate action.

23 Natural Heritage sites, coastal lagoons, and bogs are considered irreplaceable wetlands because they perform some functions that cannot be replaced through compensatory mitigation. Impacts to such wetlands would therefore result in a net loss of some functions no matter what kind of compensation is proposed.